FUNG YIN CHING & ORS. v. PUBLIC PROSECUTOR

[F.C. (Thomson L.P., Barakbah C.J. (Malaya) and Wylie C.J. (Borneo)) August 19, 1964]

[Singapore — Federal Court Criminal Appeal No. 14 of 1963]

Penal Code, ss. 124, 143, 147 and 152 — Rioting — Unlawful assembly — Trial by High Court on transfer from District Court — No preliminary inquiry held — Whether trial a nullity.

Criminal Procedure — Transfer of case to High Court — Whether preliminary inquiry a pre-condition — Criminal Procedure Code (Cap. 132), ss. 176, 179 and 192(3) and Ch. XXA.

Minor Offences (Assemblies and Procedure) Rules, 1960, r. 2.

The appellants were originally charged in the Criminal District Court under sections 124, 143, 147 and 152 of the Penal Code. They claimed trial and made an application under section 176 of the Criminal Procedure Code for the case to be transferred to the High Court for trial. The application was granted and without any further steps being taken, except service of notice of trial, the matter came on for trial before the Chief Justice of Singapore on the same charges. The appellants were convicted by the Chief Justice of unlawful assembly and rioting under sections 143 and 147 respectively of the Penal Code. On appeal it was contended that (i) by reason of no preliminary inquiry being held the trial was a nullity and (ii) the findings of the Chief Justice were against the weight of evidence.

Held: (1) the High Court had jurisdiction and power to try the case under section 176 of the Criminal Procedure Code and a preliminary inquiry is not a necessary pre-condition of the exercise of that jurisdiction and power;

(2) on the facts the appellant were rightly convicted of the charges against them and the appeals against conviction must be dismissed;

(3) having regard to the changed circumstances since the time the sentences on the appellants were imposed and bearing in mind that the appellants are of excellent personal character, justice will be served and the public interest will not be affected if the sentences of imprisonment are set aside and the appellants conditionally discharged.

FEDERAL COURT.

T. T. Rajah for the appellants.

Tan Boon Teik (Solicitor-General) for the respondent.

Cur. Adv. Vult.

Thomson L.P. (delivering oral judgment): These appellants were tried in the then High Court of Singapore on charges of, first, they attempted to overawe by the show of criminal force the Prime Minister and other Ministers of the State of Singapore in contravention of section 124 of the Penal Code; secondly, being members of an unlawful assembly whose common object was to overawe the Government and in prosecution of such common object they used force and thereby committed rioting in contravention of section 147 of the Penal Code, or, alternatively, being members of an unlawful assembly whose common object was to resist the execution of law and in prosecution of such common object they used force and thereby committed rioting in contravention of section 147 of the Penal Code; thirdly, they were members of an unlawful assembly whose common object was to overawe by the show of criminal force the executive Government of the State in contravention of section 143 of the Penal Code, or, alternatively, they were members of an unlawful assembly whose common object was to resist the execution of law in contravention of section 143 of the Penal Code; and, fourthly, they were members of an unlawful assembly whose members assaulted public servants in contravention of section 152 of the Penal Code.

There were three other charges which were tried at the same time against four other persons who were all acquitted on all such three charges and with these we are not concerned here.

The trial concluded on 29th August, 1963, that is about a year ago. The present appellants were acquitted on the first and fourth charges and on the second and third substantive charges. They were, however, convicted on the second and third alternative charges. In respect of the second alternative charge they were each sentenced to one month's imprisonment and in respect of the third alternative charge they were each sentenced to three weeks' imprisonment, these sentences to run concurrently.

Against these convictions and sentences the appellants have now appealed.

The case arose out of an episode which occurred in Singapore on 27th April, 1963, and regarding the facts there is up to a point very little material controversy.

At the material time the appellants were actively engaged in local politics. Seven of them were members of the State Legislative Assembly and the other was some sort of stipendiary functionary of the party to which the others belonged.

Some time in April they were apparently concerned with the treatment in prison of a number of persons who were detained under the local law relating to public security and they resolved to bring this matter to the notice of the local Government allegedly with a view to obtaining some alleviation of the conditions of these persons.

In pursuance of this object they got in touch with the relatives of the proposed objects of their benevolent activities, prepared petitions to the Government and, in the event, organised a procession of these relatives which was to proceed from the headquarters of the appellants' political party to the City Hall in Singapore which is the headquarters of the Government of the State of Singapore and where the Prime Minister of that State has his place of business.

In due course the procession left its starting place. It was led by some of the appellants while others proceeded by motor transport, no doubt to avoid the heat of the day, and joined it at a later stage. The number of the members of the procession, as is usual in this type of case, is not very clear. Estimates given in evidence varied from 100 to 200, but in any event it was not very formidable by reason of its numbers although some of its members were carrying banners bearing legends in the English and Chinese languages relating to the objects of the procession and pictorial representations of persons behind bars and of the Singapore Prime Minister and these were affixed to poles capable of being used as weapons.

At this stage I pause to observe, because it goes to the heart of the matter, that the procession was unlawful from beginning to end by reason of rule 2 of the Minor Offences (Assemblies and Processions) Rules, 1960, which provides that no procession consisting of five or more persons shall take place in any public place except in accordance with a police permit. No such permit had been issued in respect of this particular procession and indeed about an hour before it started a letter from the deputy commissioner of police had been handed to the sixth appellant stating it had come to the notice of the deputy commissioner that the procession was being organised and drawing attention to the fact that if it took place it would constitute an offence against the law and that legal action, the nature of which was not specified, would be taken.

Despite this warning the procession proceeded and made its way in a reasonably peaceful fashion to the City Hall accompanied by a number of police officers. At the City Hall there was a detachment of male and female police under the command of superintendent Lawrence; a few of these were standing on a line on the steps leading up to the front door and the remainder were inside.

At this point a certain amount of controversy enters into the matter but on the police evidence, which at the trial was accepted and, indeed, not very seriously contradicted, it was made clear to the then members of the procession that they should not enter the building. After some conversation, in the course of which it was explained that the procession wished to present a petition to the Prime Minister, the third appellant was allowed to proceed to the second floor of the building where the Prime Minister's room was and was followed shortly after by the first appellant. They were informed that the Prime Minister was not in the building. At first they did not accept this but apparently did so later on on the assurance of the Prime Minister's private secretary. At some stage of the argument, however, the first appellant made a signal which the police interpreted as a signal to the waiting crowd to come upstairs, but which she said was only addressed to an individual lady friend. Be that as it may, a large number of the crowd by weight of numbers forced their way through the front door into the entrance hall and up to the first and second floors pushing back the police who were clearly at great pains to avoid using unnecessary force. There were present at the scene a press photographer who had made his way in with the crowd and another photographer who, rather curiously, claimed to be an emissary of the Ministry of Culture. These photographers succeeded in taking a number of photographs although a section of the crowd attempted, in what may be regarded as a somewhat Boeotian spirit, to assault the gentleman from the Ministry of Culture and deprive him of his camera. These photographs were put in evidence at the trial and they support up to the hilt the evidence of various police officers who gave evidence. On the evidence as a whole there is no room for doubt that the crowd was determined to force its way up the stairs against the police and that considerable force and violence was used in so doing. Here, in all fairness to the appellants, it must be observed that none of them was guilty of any actual act of physical violence, although those who appear on the photographs appear to be extremely excited and angry.

In the event no great damage was done to property or to person. Peace was restored and the crowd submitted to being escorted out of the building by the police. Thereupon the appellants and a number of other persons, with whom we are not concerned, were arrested and taken before a magistrate who remanded them in custody.

The appellants were later released on bail and in due course appeared in the Criminal District Court on the charges which have already been mentioned. They pleaded to these charges and claimed trial. Then, apparently thinking the District Court might be subjected to some sort of political pressure, they applied to the High Court for an order under section 176 of the Criminal Procedure Code of Singapore, the material portions of which read as follows:—

> "Whenever it is made to appear to the High Court that —
>
> .....
>
> (o) such an order is expedient for the ends of justice
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> it may order that —
>
> .....
>
> (ii) any particular criminal case shall be transferred to and tried before the High Court."

The application was granted and an order made accordingly and in due course without any further steps being taken except service of notice

of trial the matter came on for trial before the Chief Justice of Singapore on 7th August, 1963. The charges were the same as those on which the trial in the District Court had commenced and as has been said the appellants were convicted on the second and third alternative charges and acquitted on all the others. These charges on which they were convicted read as follows:—

"(1) You.....are charged that you on the 22nd day of April, 1963, at or about 2.20 p.m. at the City Hall, Singapore, were members of an unlawful assembly whose common object was to resist the execution of law and in prosecution of such common object you and members thereof used force and you have thereby committed rioting, an offence punishable under section 147 of the Penal Code (Chapter 119).

(2) You.....are charged that you on the 22nd day of April, 1963, at 2.20 p.m. at the City Hall, Singapore, were members of an unlawful assembly whose common object was to resist the execution of law and you have thereby committed an offence punishable under section 143 of the Penal Code (Chapter 119)."

The grounds of appeal against the convictions may be summarised under two heads.

The first is that by reason of no preliminary inquiry having been held and the appellants not having been committed for trial by a magistrate the trial in the High Court was a nullity.

The second is that the findings of fact of the Chief Justice, which we shall discuss later, were against the weight of the evidence and that even if these findings of fact were correct they did not support convictions for rioting under section 147 nor convictions for unlawful assembly under section 143.

With regard to the first ground of appeal, it is necessary to examine the provisions of the Criminal Procedure Code to ascertain just what is the position of a preliminary inquiry by a magistrate in the statutory scheme of criminal adjudication, for there can be no question of it being something that natural justice demands should be held as a preliminary condition of any criminal trial so as to let the accused know the case against him or anything of the sort. After all the great majority of persons convicted of criminal offences both here and in England are convicted after a summary trial without any question of a preliminary inquiry.

Coming, then, to the Code it is clear that the High Court can take cognizance of a criminal offence in one of three ways:—

(1) The accused person may be committed for trial by a magistrate under Chapter XVII. That is a usual course.

(2) The Attorney-General may exhibit an *ex officio* function under section 392. This is unusual.

(3) The court may (as was done here) make an order under section 176 transferring an individual case to itself for trial. That is also an unusual course and we are told in the course of argument that this is probably the first occasion on which it has been followed in Singapore.

Now it seems clear that if any one of these three courses is followed there can be no question that the High Court has cognizance of the case, that is to say it has jurisdiction and power to try and dispose of it.

The question then arises whether a preliminary inquiry having been held is a necessary pre-condition of the exercise of that jurisdiction and power.

Where the case has been committed under Chapter XVII the question does not arise because *ex hypothesi* there has been a preliminary inquiry.

Turning to the other two classes of cases, it is quite clear that had the present case been tried by a judge as it would have been prior to the commencement of the Criminal Procedure Code (Amendment) Ordinance, 1960, the trial would have been governed by the provisions of Chapter XX of the Code and the provisions of that chapter make the holding of a preliminary inquiry a necessary condition. That arises by reason of section 192(3) which reads as follows:—

"A person who has not given evidence at a preliminary inquiry shall not be called as a witness by the prosecution at any trial before the verdict of the jury is given, unless the accused person or his advocate and the registrar have been previously served with a notice in writing of the intention to call such person stating the person's name and address and the substance of the evidence intended to be given."

That section applies to trials by jury. That means that prior to 1960 it applied to all trials in the High Court but now it only applies in the case of capital trials. In 1960 the Legislature enacted the Criminal Procedure Code (Amendment) Ordinance (No. 18 of 1960) which has amended the Criminal Procedure Code in a number of ways.

In the first place it provided that only capital cases should be tried by a judge and jury in accordance with the provisions of Chapter XXI. It then enacted a new Chapter XXA headed "TRIALS BEFORE THE HIGH COURT WITHOUT A JURY" which applied to and regulated the conduct of all trials other than capital ones. It is in the highest degree significant that section 177B in the new Chapter XXA differs from section 192 in Chapter XXI. In particular it omits the requirement that "a person who has not given evidence at a preliminary inquiry shall not be called as a witness by the prosecution". From this the conclusion would seem to follow that when the Legislature enacted the 1960 Ordinance it contemplated that the requirement

of a preliminary inquiry should not apply in non-capital cases in respect of which the court had cognizance otherwise than by reason of commitment by a magistrate.

And I would add in parenthesis that the same line of reasoning disposes of the argument that was addressed to us that there was something wrong here because this particular case was not tried at a gazetted Assizes. The relevant section of Chapter XXI is section 179 which states that every accused committed for trial shall, unless the High Court otherwise orders, be tried at the Assizes next ensuing after such committal. But again there is nothing corresponding to that in the new Chapter XXA and we are therefore forced to the conclusion that the Legislature intended that that particular provision should only apply to capital cases triable by a jury.

So much for the first group of grounds of appeal.

Coming now to the other aspects of the case and the other grounds on which the convictions have been appealed against, as has been said there has been no very great controversy as to the facts and, with all respect to the careful and persuasive argument which has been addressed to us by Mr. Rajah (which we have found very helpful) we can see no reason for differing from the conclusions at which the Chief Justice arrived regarding the facts.

He rejected (and no complaint has been made of this) the suggestion of an intention to overawe the Government. What he did find was that, whatever happened on the steps outside the City Hall, the police tried to prevent the crowd from going further into the Hall than the ground floor and that a large number of the crowd, including the appellants, then formed a common intention to go up to the floor on which the Prime Minister's room was situated in spite of the police and proceeded to use force in prosecution of that intention.

The Chief Justice regarded that intention as intention to resist the execution of the law. I shall return to that in a moment, but before doing so it would be as well to refer to the terms of the material sections of the Penal Code.

Section 141 defines "unlawful assembly" as an assembly of five or more persons with a common object to do one of a number of things which are set out under five heads. It is only necessary to refer to the second and third heads. The second is to resist the execution of any law, or of any legal process, and the third is to commit any mischief or criminal trespass or other offence. The Chief Justice was of the opinion that the present case fell under the second of these heads. For reasons which I am about to state we are not prepared to quarrel with that conclusion, but it seems to us he could equally have held that it fell under the third head.

Regarding the second head, section 110 of the Criminal Procedure Code reads as follows:—

> "Every police officer may interpose for the purpose of preventing and shall to the best of his ability using all lawful means prevent the commission of any offence."

That places a duty upon the police and it confers upon them the power to carry out that duty.

In the present case all the appellants and a great number of other people commenced to commit an offence when the procession was formed and started on its way. It is true that that was not an offence in the sense that the word is used in the Penal Code; but it was an offence in the sense in which the word is used in the Criminal Procedure Code, it was an offence against the Minor Offences (Assemblies and Processions) Rules. And so long as that unauthorised procession continued in existence that offence continued to be committed and by reason of section 110 the police had the power, and were indeed obliged, to prevent it and to use lawful means to that end, that is to say to execute the law. It is immaterial in the present case that the police in their discretion did not intervene right at the beginning, that they did not intervene in the public streets but that they refrained from intervening until what they considered a suitable time. When they did so intervene, however, it is clear that the crowd, including the appellants, formed a common intention to resist what they were doing by way of execution of the law. In the circumstances everyone who was present and animated by that common intention was guilty of the offence of unlawful assembly and when that common intention was prosecuted and any degree of force was used in the prosecution of it then every other member of the unlawful assembly was also guilty of rioting irrespective of whether or not he himself individually used actual force.

On that the case clearly fell within the second head of section 141. But it also fell under the third head of section 141. What really matters is not the label that is attached to what was done, it is the substance and the facts as they have been found clearly made out that those present had formed the common intention (which they proceeded to prosecute) of obstructing public officials in contravention of section 186 of the Penal Code which reads:—

> "Whoever voluntarily obstructs any public servant in the discharge of his public functions, shall be punished with imprisonment for a term which may extend to three months, or with fine which may extend to five hundred dollars, or with both."

That, it is hardly necessary to add, is an offence within the meaning of section 40 of the Penal

Code and is therefore an offence for the purposes of section 141.

In all the circumstances of the case, then, we are compelled to dismiss the appeals against conviction.

As regards sentences, it is our view that at the time they were imposed (it is about a year ago) they were proper sentences, and indeed if they erred at all they erred on the side of leniency. Clearly, in the circumstances which then prevailed an episode such as the sort of which we are concerned with here was potentially a very grave threat to the security of this place. Since then, however, circumstances have altered in a number of respects which must be well-known to all, although I do not think it is necessary for us to particularize them in detail. Having regard to these changed circumstances we are of the opinion, bearing in mind that as far as we know these people are all of excellent personal character, that justice will be served and the public interest, which after all must be paramount, will not be affected if we set aside the sentences of imprisonment and order that each of the appellants be discharged on entering into a bond in the sum of $1,000 for six months to be of good behaviour and to come up for judgment if called upon.

Appeals dismissed.

SEAH SIAK HOW v. PUBLIC PROSECUTOR

[A.C.J. (Wee Chong Jin C.J.) October 7, 1964]

[Singapore — Magistrate's Appeal No. 37 of 1964]

Road Traffic Ordinance, 1961, s. 26(1) — Causing the death of a person by driving a motor car recklessly — Meaning of "reckless" — Charge reduced to one of causing death by negligence.

Negligence — Causing death by "reckless" driving — Reduction of charges to one under Penal Code, s. 304A.

In this case the appellant appealed against his conviction on a charge of causing the death of a person by driving a motor car on the road recklessly, by failing to exercise due care and attention.

Held: (1) to bring home a charge under section 26 of the Road Traffic Ordinance in respect of driving recklessly it must be shown that the driving is such as to amount to rash driving and the driver of the vehicle in question must be heedless of the state of affairs on the road in question;

(2) in this case the evidence was not sufficient to found a conviction for reckless driving under section 26 of the Road Traffic Ordinance and the conviction must be altered to one under section 304A of the Penal Code for causing death by negligence.

Case referred to:—

(1) *R.* v. *Grunwald & Ors.* [1960] 3 All E.R. 380.

MAGISTRATE'S CRIMINAL APPEAL.

K. C. Chan for the appellant.

Francis T. Seow (Sr. Crown Counsel) for the respondent.

Cur. Adv. Vult.

Wee Chong Jin C.J.: This appeal is against the conviction of the appellant on a charge under section 26(1) of the Road Traffic Ordinance 1961. The appellant was charged with causing the death of Lee Goh Thong by driving motor car No. JA. 3059 on the road recklessly, to wit, by failing to exercise due care and attention. He was found guilty on this charge and sentenced to four (4) months' imprisonment and a disqualification from driving for a period of three (3) years.

Before me it is conceded by counsel for the appellant and rightly so I think that on the evidence before the learned magistrate there was sufficient to found a conviction based on negligence and therefore sufficient to found a conviction on a charge under section 304A of the Penal Code.

It was argued however that there was no evidence to support a conviction for driving recklessly and thereby causing death under section 26 of the Road Traffic Ordinance. The argument as I understand it is based on the contention that to bring home a charge of driving recklessly under this section of the Road Traffic Ordinance there must be shown that the negligence was of such a degree as to amount to the offence of manslaughter in England. "Reckless" according to the *Oxford* English Dictionary means, in respect of action conduct or things "characterised or distinguished by heedless rashness". That definition in its context has been judicially accepted in a criminal case in England in the case of *Rex* v. *Grunwald & Ors.*,[1] and must in my opinion be the meaning which should be attributed to it under the Road Traffic Ordinance. It follows that to bring home a charge under section 26 in respect of driving recklessly it must be shown that the driving is such as to amount to rash driving and the driver of the vehicle in question must be heedless of the state of affairs on the road at the time in question. That being the degree of proof required, what is the evidence in this case. There were two so to speak eye witnesses and they were two ladies who were passengers in the trishaw ridden by the deceased at the time when it was run into by the appellant's car. Both gave evidence merely to the effect that simultaneously or almost immediately after the trishaw was overtaking a parked vehicle the trishaw was hit by a car from behind. One witness was treated as an outpatient in the hospital and the other lost consciousness but there is no evidence whether or not she was hospitalised. The only other evidence bearing on this matter is that of a police sergeant who arrived at the scene approximately one hour after the accident and his evidence was that he found the road surface was dry and the visibility was good and that when he was there the flow of traffic at